Public Prosecutor v Lim Hong Chin

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KG55 OF 1992(I)
CHONG SIEW FAI J
4 SEPTEMBER 1993

Criminal Procedure *— Sentence — Binding over — Handling stolen property — Plea of guilty —Whether s 294(i) of the Criminal Procedure Code (FMS Cap 6) was capable in law of being applied — Whether the court's discretion to invoke subsection could be exercised in offences punishable with imprisonment or fine or both — Criminal Procedure Code (FMS Cap 6) s 294(i)*

The accused pleaded guilty to the charge of voluntarily assisting in the disposal of certain articles knowing them to be stolen property, an offence under s 414 of the Penal Code (FMS Cap 45). After hearing the plea of mitigation by counsel for the defence, the trial magistrate made an order under s 294(i) of the Criminal Procedure Code (FMS Cap 6) ('the Code'), 'binding over' the accused with two sureties in the sum of RM5,000 to be of good behaviour for a period of three years. In this appeal, the deputy public prosecutor raised the availability of s 294(i) of the Code, having regard to the form of punishment provided for the offence in the Penal Code (FMS Cap 45), and further contended that even if s 294(i) was capable in law of being applied, it was wrongly resorted to having regard to the nature of the offence committed and by taking irrelevant factors into consideration. In relation to the applicability of s 294(i), the issue raised was whether the discretion to invoke the subsection could be exercised in offences as the present one where they were punishable with imprisonment or fine or both.

Held, dismissing the appeal:
If the legislature had intended to confine the application of s 294(i) to offences punishable with imprisonment only, without the option of any alternative penalty, it would have expressly so enacted by using some appropriate words to that effect or by simply adding the word 'only' in the appropriate place in s 294(i). In any event, this being a penal law, the benefit of doubt of any uncertainty should be given to the subjects on whom penalty is to be enforced, and the provisions should be so construed that those persons who are or might reasonably be within it should not be excluded from it.

[Bahasa Malaysia summary

Tertuduh telah mengaku salah terhadap tuduhan menolong melupuskan barang-barang tertentu secara sukarela walaupun mengetahui bahawa barang-barang itu adalah barang-barang yang telah dicuri, iaitu suatu kesalahan di bawah s 414 Kanun Keseksaan (FMS Bab 45). Selepas mendengar rayuan meringankan hukuman oleh peguambela, majistret perbicaraan telah membuat suatu perintah

di bawah s 294(i) Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu'), 'binding over' tertuduh dengan dua orang penjamin dalam jumlah RM5,000 supaya berkelakuan baik selama tempoh tiga tahun. Di dalam rayuan ini, timbalan pendakwa raya telah mempertikaikan penggunaan s 294(i) Kanun itu, memandangkan hukuman untuk kesalahan itu yang diperuntukkan di dalam Kanun Keseksaan (FMS Bab 45), dan selanjutnya berhujah bahawa walaupun s 294(i) boleh digunakan dari segi undang-undang, ia telah digunakan dengan salah memandangkan sifat kesalahan yang telah dilakukan dan dengan mempertimbangkan faktor yang tidak relevan. Berkaitan dengan pemakaian s 294(i), isu yang telah dibentangkan adalah sama ada budi bicara untuk memakai subseksyen itu boleh digunakan untuk kesalahan seperti di dalam kes ini di mana kesalahan itu boleh dihukum dengan pemenjaraan atau denda atau kedua-duanya.

Diputuskan, menolak rayuan itu:
Jika badan perundangan berniat menghadkan penggunaan s 294(i) kepada kesalahan yang boleh dihukum dengan pemenjaraan sahaja, tanpa opsyen untuk sebarang penalti yang lain, ia dengan jelas akan menyatakan demikian dengan menggunakan perkataan yang sesuai atau dengan menambahkan perkataan 'only' di tempat yang sesuai di s 294(i). Walau bagaimanapun, oleh kerana ini merupakan suatu undang-undang keseksaan, faedah keraguan mengenai apa-apa yang tidak jelas harus diberikan kepada mereka yang dikenakan penalti itu, dan peruntukan perlu ditafsirkan supaya seseorang yang mungkin atau semunasabahnya ditakluk olehnya tidak akan dikecualikan daripadanya.]

Notes
For cases on binding over, see 5 *Mallal's Digest* (4th Ed) paras 2064–2067.

Cases referred to
1 *PP v Loo Choon Fatt* [1976] 2 MLJ 256 (refd)
2 *PP v Idris* [1955] MLJ 234 (refd)
3 *Raja Izzuddin Shah v PP* [1979] 1 MLJ 270 (refd)
4 *Teo Siew Peng & Ors v PP* [1985] 2 MLJ 125 (refd)
5 *Tan Khoon Eng v PP* [1992] 2 MLJ 132 (refd)
6 *PP v Yeong Yin Choy* [1976] 2 MLJ 267 (folld)
7 *PP v Leonard Glenn Francis* [1989] 2 MLJ 158 (distd)
8 *PP v Mohamed Nor & Ors* [1985] 2 MLJ 200 (refd)

Legislation referred to
Firearms (Increased Penalties) Act 1971 s 8

Abdul Rahman bin Sebli (Deputy Public Prosecutor) for the appellant.
Sim Thong Poh (*Sim Thong Poh Advocates*) for the respondent.

Cur Adv Vult

Chong Siew Fai J: This is an appeal by the prosecution against the order of 'binding over' of the accused with two sureties in the sum of RM5,000 to be of good behaviour for a period of three years. The order was made under s 294(i) of the Criminal Procedure Code (FMS Cap 6) ('the Code').

The accused pleaded guilty to the charge of voluntarily assisting in the disposal of certain articles knowing them to be stolen property, an offence under s 414 of the Penal Code (FMS Cap 45). After hearing the plea of mitigation by counsel for the defence, the learned trial magistrate ordered as stated above.

In this appeal, the learned deputy public prosecutor raised the availability of s 294(i) of the Code having regard to the form of punishment provided for the offence in the Penal Code (FMS Cap 45), and further contended that even if the said s 294(i) was capable, in law, of being applied, it was wrongly resorted to having regard to the nature of the offence committed and by taking irrelevant factors into consideration.

In relation to the applicability of the said s 294(i), the issue raised was whether the discretion to invoke the subsection could be exercised in offences as the present one where they were punishable with imprisonment or fine or both. The learned deputy public prosecutor contended that there was no discretion to invoke the said s 294(i) in the circumstance, citing *PP v Loo Choon Fatt*[1] and *PP v Idris*.[2]

There appears to have been no Supreme Court decision on the point. A number of cases at the High Court level applied or approved the use of the said s 294(i) without dwelling upon the issue raised above, eg *Raja Izzuddin Shah v PP*;[3] *Teo Siew Peng & Ors v PP*;[4] and *Tan Khoon Eng v PP*.[5]

As to the two cases referred to by the learned deputy public prosecutor:

(1) In *PP v Idris*,[2] Thomson J (as he then was) said (in my opinion, obiter) that s 294 of the Code applied only to offences punishable with imprisonment without the option of a fine. I say obiter because there the offence involved (s 4(2) of the Motor Vehicles (Driving Offences) Proclamation) was punishable with a fine only and the observation of Thomson J was made in the course of distinguishing ss 173A and 294 of the Code.

(2) In *PP v Loo Choon Fatt*,[1] Hashim Yeop A Sani J (as he then was) was of the opinion that s 294 of the Code could not be applied to an offence under s 12(2) of the Dangerous Drugs Ordinance 1952 because of the alternative punishment of either a fine or imprisonment therein provided.

Holding the contrary view is the case of *PP v Yeong Yin Choy*.[6] In that case, the sole question referred for determination was whether s 294 of the Code was applicable to an offence punishable with imprisonment with the option of a fine. Abdoolcader J (as he then was) after discussing at length, concluded that the provisions of s 294 were applicable in the case of a conviction for an offence punishable with imprisonment whether with or without the option of a fine or other alternative penalties.

After some anxious consideration and with the greatest respect, I tend to agree with *PP v Yeong Yin Choy*.[6] If the legislature had intended to confine the application of the said s 294(i) to offences punishable with imprisonment

only without the option of any alternative penalty, it would have expressly so enacted by using some appropriate words to that effect or by simply adding the word 'only' in the appropriate place in the said s 294(i). In any event, this being a penal law, the benefit of doubt of any uncertainty should be given to the subjects on whom penalty is to be enforced, and the provisions should be so construed that those persons who are or might reasonably be within it should not be excluded from it.

Two more recent case, however, may be mentioned:

(1) *PP v Leonard Glenn Francis*;[7] and
(2) *PP v Mohamed Nor & Ors*[8] which was referred to by learned counsel for the respondent.

PP v Leonard Glenn Francis[7] was a case concerning s 8 of the Firearms (Increased Penalties) Act 1971 which provides:

> Any person who is in unlawful possession of a firearm shall be punished with imprisonment for a term which may extend to fourteen years and with whipping with not less than six strokes.

And Edgar Joseph Jr J (as he then was) said [at p 161]:

> Once a conviction is recorded in respect of an offence under s 8 of the Firearms (Increased Penalties) Act 1971, the provisions of s 294 of the Criminal Procedure Code are overridden and the court must proceed to impose a sentence of imprisonment and whipping with not less than six strokes.

As may be seen from the above, the said s 8 provides not only two mandatory forms of punishment, ie imprisonment sentence *and* whipping, but also that the whipping has to be not less than six strokes whereas the issue raised in our present appeal is whether s 294(i) of the Code is exercisable in offences punishable with imprisonment with the option of a fine or with both imprisonment and fine. In other words, *PP v Leonard Glenn Francis*[7] dealt with a penal provision different from that raised by the issue in the present appeal. The case is, therefore, to that extent, distinguishable. Also, *PP v Yeong Yin Choy*,[6] it may be noted, was not considered in *PP v Leonard Glenn Francis*.[7]

As regards the case of *PP v Mohamed Nor & Ors*,[8] (a Supreme Court decision) although that case did not deal directly with the issue raised in the instant appeal before me, there is some indication that s 294(i) of the Code may be properly invoked. That case involved s 298A of the Penal Code (FMS Cap 45) which, at the material time, provided punishment of imprisonment for a term that might extend to three years, or with a fine, or with both — similar form of wording as that in s 414 of the Penal Code (FMS Cap 45). The Supreme Court declined to interfere with the decision of the High Court imposing 'binding over' orders under the said s 294.

As regards the facts and circumstances of the present case under appeal, it is not disputed that the articles concerned formed no component part of a motor vehicle and that the role of the accused in the disposal took the form of purchase of the articles which the accused gave to his relatives as gifts.

In the grounds of judgment, the learned trial magistrate gave various factors as to why she considered the case a proper one for resorting to s 294(i) of the Code. These included the remorse shown by the accused, his clean record, the plea of guilty, the motive for the purchase, co-operation with the police, public interest, and the unsuitability of custodial sentence on the facts and circumstances of the case. The learned trial magistrate seemed to be of the opinion that given the opportunity, the accused was unlikely to commit offences of a similar nature again. In any event, should the accused fail to observe the condition of the bond during the period of three years, he may be directed to appear in court to receive judgment.

In all the circumstances, I do not consider that there is good reason for interfering with the discretion exercised by the learned trial magistrate.

The appeal is dismissed.

Appeal dismissed.

Reported by Jeanne Tan